A

PP

v.

LEILA FATEMI & ANOTHER CASE

B

HIGH COURT MALAYA, PULAU PINANG
MOHD AMIN FIRDAUS JC
[CRIMINAL TRIALS NO: 45-45-09/2011 & 45-46-09/2011]
28 MARCH 2012

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Drugs found concealed in hidden compartment of luggage - Ingredients of offence - Custody, control and possession - Whether proved - Whether accused had knowledge of drugs*

D ***CRIMINAL PROCEDURE:*** *Mens rea - Trafficking in dangerous drugs - Drugs found concealed in hidden compartment of luggage - Whether accused had knowledge of drugs - Whether knowledge could be inferred by way of perception - Dangerous Drugs Act 1952, s. 39B(1)(a)*

The two accused persons, Leila Fatemi ('LF') and Sahar E Mohammadi ('SM'), Iran nationals, were separately charged for the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') which is punishable under s. 39B(2) of the same. Both accused were jointly tried. They were arrested by PW9, the investigating officer, after being F found carrying 1750.2 and 2160.85 grammes of Methamphetamine respectively. According to PW9, he and his team approached the accused upon finding them behaving suspiciously after disembarking from an aircraft from Singapore. The two accused were carrying trolley bags which were not locked. The bags were scanned and G PW9 and PW7 saw suspicious green images inside the two bags. The bags were subsequently inspected and drugs were found concealed in the bags. PW9 testified that both accused looked restless and subsequently after the drugs were found, both began to cry. Another officer, PW11 testified that before being detained H both accused looked happy and were laughing and after they had been detained, they appeared restless and subsequently cried when drugs were found in their bags. In her defence, LF argued that the prosecution did not prove possession and thus no presumption provided by the DDA applied. On the other hand, SM in her I defence stated that the prosecution had failed to prove the

elements of trafficking, *ie*, custody, control and possession against the accused pertaining to the drugs found hidden in her bag. She further contended that the prosecution had failed to prove *mens rea* possession/knowledge of the drugs.

Held (acquitting and discharging both accused at end of prosecution's case):

(1) Upon maximum evaluation of the prosecution evidence, the prosecution only proved mere possession of the two trolley bags without *mens rea* possession on the part of the two accused in relation to the concealed drugs inside them. *Saad Ibrahim v. PP* (refd). (para 87)

(2) The accused's conduct, of being restless and in fearful manner before the discovery of the hidden drugs and being in tears upon the discovery, had been relied on heavily by the prosecution. Based on the case of *PP v. Majid Saleh Jahromi bin Amrollah*, it was insufficient to rely on evidence of witness that the respondent looked fearful and restless in order to infer knowledge against the respondent, as that was a matter of perception. There must be some positive conduct. On the facts of the instant case, the accused did not try to make a bolt when they were confronted by PW9 and his team nor did they attempt to prevent their bags from being searched. (paras 88-89)

(3) There were two pieces of evidence by the prosecution witnesses as to the appearance of both the accused, before they were detained, that contradicted with one another. In the circumstances where more than one inference could be drawn, the one that was more favourable to the accused should be adopted. Hence by being seen to be happy and laughing at the airport, the court could infer that both accused did not have any knowledge of the hidden drugs in their trolley bags. (paras 90-93 & 95)

(4) The very fact that both the bags were not padlocked gave rise to the inference that both accused did not know at all about the presence of the concealed drugs inside the specially modified compartments inside each bag. Further, the very spontaneous action of LF in allowing PW7 to open and search the contents of her bag without any hesitation

strengthened the inference that she had no knowledge of the drugs concealed in the bag. At the same time, there was also possibility of access by other persons to the bags resulting in the drugs being put into the specially modified compartments of the bags without the knowledge of both the accused. (para 104, 109 & 117)

(5) Further, based on the evidence with regards to the luggage tag, the court concluded that the prosecution had not incriminated both accused with *mens rea* possession of the concealed drugs and failed to establish one of the important ingredients of the offence, that is knowledge. Both accused were only found to have mere possession of the trolley bags without *mens rea* knowledge of the incriminating drugs hidden. Hence the element of trafficking under s. 2 of the DDA did not apply. (paras 118 & 123)

(6) Upon maximum evaluation of the prosecution evidence as well as assessing the credibility of the prosecution witness and the reliability of the documentary evidence adduced by the prosecution, the court found that the prosecution had not established a *prima facie* case against both accused. (para 125)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(foll)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chiah Tian v. Rex [1937] 1 LNS 9 HC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Lee Kwan Woh v. PP [2010] 2 AMR 245 ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Liew Chee Hong v. PP [2007] 6 CLJ 702 CA ***(refd)***
Lim Beh & Ors v. Opium Farmer [1842] 3 Kyshe 10 ***(refd)***
Lim Hong Yap v. PP [1978] 1 LNS 100 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA
Ong Ah Chuan v. PP And Another Appeal [1980] 1 LNS 181 PC
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(dist)***
Phoon Liat Sum v. PP [1950] 1 LNS 47 HC ***(foll)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Hafiszamri Ahmad & Anor [2007] 1 CLJ 285 CA ***(refd)***
PP v. Majid Saleh Jahromi Amrollah [2012] 6 CLJ 236 CA ***(foll)***

PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC
Saad Ibrahim v. PP [1967] 1 LNS 154 HC ***(refd)***
Sridhar Arunasalam v. PP [2009] 6 CLJ 595 CA
Su Ah Ping v. PP [1979] 1 LNS 100 FC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(foll)***
Tan Boon Teck v. PP [1949] 1 LNS 89 HC ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 SC ***(refd)***
The Queen v. Woodrow, 16, LJ MC 122 ***(refd)***
Toh Ah Loh & Mak Thim v. R [1948] 1 LNS 72 HC ***(refd)***
Toh Su Kuan v. PP [2005] 3 CLJ 740 CA ***(refd)***
Yusri Pialmi v. PP [2010] 4 CLJ 828 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 153(1), 156, 180(1), (2), (3), (4)
Dangerous Drugs Act 1952, ss. 2, 8, 37(d)
Firearms and Ammunition (Unlawful Possession) Ordinance 1946, s. 3
Trade and Customs Enactment, Johore, ss. 39(1)(e), 135(1)(d)

Criminal Procedure Code [Sing], s. 155
Liquors Revenue Ordinance, s. 28(1)

Other source(s) referred to:
Stephen's Digest, 9th edn, p 304

For the prosecution - Nur Ashikin Mokhtar DPP
For the 1st accused - Harpal Singh; M/s Harpal Singh & Co
For the 2nd accused - Mohd Ismail Mohamed (Noraishah Mohd Ismail with him); M/s Ismail, Khoo & Assoc

Reported by S Barathi

JUDGMENT

Mohd Amin Firdaus JC:

[1] The two accused persons namely Leila Fatemi and Sahar Mohammadi both Iran nationals were charged with the following charges respectively and both of them were jointly tried:

Pertuduhan (Leila Fatemi) Criminal Trial No: 45-45-09/2011

Bahawa kamu pada 19hb Februari 2011, jam lebih kurang 8.10 malam di Balai Ketibaan LTAB Bayan Lepas, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, telah memperedarkan

A dadah berbahaya iaitu sejumlah berat 1750.2 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

B **Pertuduhan (Sahar Mohammadi) Criminal Trial No: 45-46-09/ 2011**

Bahawa kamu pada 19hb Februari 2011, jam lebih kurang 8.10 malam di Balai Ketibaan LTAB Bayan Lepas, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, telah memperedarkan
C dadah berbahaya iaitu sejumlah berat 2160.8 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

D **[2]** Although the court noted that both charges have stated "LTAB" the place of the alleged offence then contrary to s. 153(1) of the Criminal Procedure Code (See also *Lim Beh & Ors v. Opium Farmer* [1842] 3 Kyshe 10), nonetheless applying
E s. 156 of the same Code, the court was of the opinion that both accused persons were not misled by the omission to state the name of the airport in full. It is understood to be "Lapangan Terbang Antara Bangsa."

F **[3]** In *Lim Hong Yap v. PP* [1978] 1 LNS 100, the Court of Criminal Appeal held that "even if there were insufficient particulars in the charge as framed, such omission cannot, in terms of s. 155 (of the Singapore Procedure Code) be regarded as material unless it is shown by the appellant that he had in fact been misled by such omission."

G **[4]** In any event both learned defence counsel for the respective accused persons did not make an issue on the omission.

Prosecution Case

H **[5]** The prosecution witness, Sukhari bin Samsudin (PW5) the chemist had testified that after analysing the crystalline substances found inside the two plastic bags sent by the investigating officer (Inspector) I/19856 Mohd Kamal bin Abd. Wahab (PW12) on 22 February 2011, he found one of the two bags contained
I 1750.2 and the other one contained 2160.8 grams of methamphetamine.

[6] When he received the two plastic packages containing crystalline substances each kept in one of the two sealed cardboard boxes marked "M" and "MK," the two boxes and their contents were intact and in good condition.

[7] The star witness for the prosecution (Chief Inspector) C/I 13140 Balber Singh a/l Hadep Singh (PW9) the complainant in this case who is the Investigating Officer in the Investigation Division for Narcotics Crimes in the Penang Bayan Lepas International Airport, gave evidence that on 19 February 2011 at about 8.10pm he was with his team of police personnel at the airport International Arrival Hall monitoring the movements of both domestic and international passengers.

[8] At that time an aircraft from Singapore had landed and all the disembarked passengers were seen to be retrieving their baggage from the carousel (exhibit photographs P5A and P9 [2]) when PW9 spotted two foreign women in suspicious manner (yang berada dalam keadaan mencurigakan). After both the foreign women had collected their individual baggages, PW9 and his team approached them and PW9 identified himself as a police officer and asked for their passports to be inspected. He communicated with them in simple English language and was sure both women understood him. He found the two women foreigners to hail from Iran, one named Leila Fatemi in the Passport No: U 19755723; her surname is Fatemi and her father's name is Hossein; and her date of birth is 21 March 1976; and the other named Sahar Mohammadi in her Passport No: T 19617791; her surname is Mohammadi and her father's name is Bijan; and her date of birth is 18 October 1990.

[9] PW9 later identified Leila Fatemi (LF) and Sahar Mohammadi (SM) as both the accused persons at the trial. He said that the accused LF was bringing a chocolate-coloured trolley bag (exh. P17) while the accused SM was bringing a light coloured blue trolley bag (exh. P18). Both the trolley bags were not locked.

[10] PW9 next directed the two accused to bring their bags to the scanning machine and requested Md Azrul bin Munin (PW7), a customs officer to scan the two trolley bags. At the scanner, PW9 ordered both the accused to put their bags on the scanning

machine. PW7 and PW9 saw suspicious green images inside the two bags which were scanned twice. PW9 said that at that time the reaction of the two accused was restless and both of them asked all sorts of questions.

[11] After the scanning was done, PW9 and his police personnel brought the two accused together with their trolley bags to the Narcotics Office in the airport for further examination. P17 was brought along by LF and P18 by SM. When PW9 wanted to inspect their bags further, both the accused still reacted restlessly.

[12] In the Narcotics Office, PW9 instructed (Detective Corporal) D/Cpl 122482 Zaimi bin Abidin (PW10) and D/Cpl 116276 Mat Saffar bin Saad (PW6) to open the chocolate coloured trolley bag (P17) belonging to LF after opening it they took out all the clothing. They pressed the bottom of the bag and felt something hidden there. PW9 then directed both PW10 and PW6 to take out the bottom layer and it had to be torn out as it was glued to the bottom of the bag. The two bars attached to the trolley handle were screwed into the bottom layer of the bag and after removing the screws, the whole handle and the attached bars were dislodged from there.

[13] After removing the handle and the two bars affixed to it, they saw one transparent plastic bag containing crystalline substance (ketulan jernih) suspected to be the drug syabu. Following the discovery, PW9 told the accused LF that they had found drugs and she cried. PW9 then kept the packet with its content in front of him.

[14] PW9 also directed D/Cpl 118453 Mansor bin Yaacob (PW11) and D/Cpl 69243 Abdul Wahab bin Abdul Kadir to open the light coloured blue trolley bag (P18) belonging to SM. PW9 first ordered SM to open the bag and take out her clothing and after the clothes were taken out, then only he asked both PW11 and D/Cpl Abdul Wahab to tear out the bottom layer by the same means used to get hold of the plastic packet of drugs concealed at the bottom of P17.

[15] After the bottom layer of the bag (P18) had been torn open, they discovered a transparent plastic packet containing the drug syabu on suspicion.

[16] Upon the discovery of the drugs, PW9 marked the exhibit and put it back into the bag and told SM that drugs had been discovered inside her bag and she began to cry. He spoke to her in the English language and was certain she understood him.

[17] PW9 followed up by searching the hand bags carried by the two accused but found nothing inside them to be incriminating. PW9 testified that from the beginning when he first detained the two accused until the time before the drugs were discovered, both LF and SM looked restless and subsequently after the drugs were found both began to cry. He then prepared a separate Search List for each accused and made a police report on the arrest of the accused LF and SM. All this while, the exhibits seized were under his control.

[18] Following this PW9 informed the investigating officer I/19856 Mohd Kamal bin Abdul Wahab (PW12) about the arrest of the two accused and handed over to PW12 LF and SM together with all the exhibits seized and the Handover List (P29) listing down all the exhibits seized from both the accused. PW9 then said his role in these two cases ended when they were taken over by PW12.

[19] PW7 gave evidence that on 19 February 2011 he was working shift duty in the airport when PW9 requested him to scan two trolley bags, one blue (P18) and one brown in colour (P17). PW7 said that the first time he scanned both bags together with the clothing and other personal belongings inside them and the second time he scanned P17 and P18 empty without them. PW7 said "Hampir tiga kali beg-beg troli discan." During the examination-in-chief, the learned Deputy Public Prosecutor asked: "Apa hasil imbasan ID17 (at that stage it was still marked as ID17 and not P17)?

[20] SP7: Ketika pertama kali diimbas beg nampak padan dengan pakaian dan barang keperluan. Selepas diimbas, didapati terdapat sedikit keraguan gambaran imej yang diimbas. Saya bertindak untuk buka dan memeriksa barangan di dalam beg tersebut. Ketika itu penumpang (referring to LF) pun membenarkan saya membuka beg …

[21] PW7 said that the second scan on both bags revealed suspicious images overlapping which could not be seen hidden inside each bag. PW7 and the police then knocked on the bottom section of the bags and felt something concealed there.

[22] The evidence of PW7 adduced was basically to corroborate the evidence of PW9 to show that the scanning machine reflected suspicious images inside P17 and P18 which upon further examination of both bags ultimately led to the discovery of the drugs hidden inside them.

[23] PW10 testified that on 19 February 2011 at about 8.10pm he was with PW9, PW11, PW6, D/Cpl Abdul Wahab, D/Cpl Wan Azmi, D/Cpl 136868 Catherene a/k Idam and L/Cpl 140031 Rafedah bt Aman Ashaari detained the two accused "dalam keadaan mencurigakan" near the Customs Cashier Counter in the International Arrival Hall of the airport. When PW9 identified himself as a police officer to LF and SM and asked for their passports, PW10 said that both accused reacted "dalam keadaan gelisah" (in a restless manner).

[24] PW10 also said that when PW9 told both accused of the discovery of suspicious images inside their bags arising from the scanning by PW7, their reaction was "keadaan gelisah" (in a restless manner).

[25] PW10 further continued in his evidence that PW9 then directed him and PW6 to inspect P17, the trolley bag brought by LF. The bag was opened by D/Cpl Mat Safar in front of the accused LF and witnessed by PW9 and PW10 himself. When the transparent plastic packet of drugs was finally discovered from the specially modified bottom compartment of the bag, PW9 took out the packet from the bag. According to PW10, both accused became frightened and started to cry.

[26] The prosecution's next witness PW11 gave evidence that on 19 February 2011 at about 8.10pm he was on duty as a narcotics detective in the airport Arrival Hall under his supervisor I/Balber Singh a/l Hadep Singh (PW9) together with D/Cpl Abdul Wahab and other police personnel he could not remember. PW11 said that PW9 identified himself as "Police" to SM in the English language, one of the two women passengers from Iran detained. He later identified them as the accused LF and the accused SM and at that time each of them was bringing along a trolley bag.

[27] PW11 could only recollect the light coloured blue trolley bag which PW9 scanned. In his evidence, PW11 told the court that before SM was detained she looked happy but after she was detained her facial expression changed (air muka OKT2 berubah). Following this PW9 directed that both accused to bring their trolley bags to the Narcotics Office at the airport for further examination.

[28] In the Narcotics Office, PW11 was asked by PW9 together with D/Cpl Abdul Wahab to open P18 which was then closed and locked. Both of them opened the light coloured blue trolley bag and checked all the clothing and felt as if there was an object at the bottom of the bag and prised the covering on top of it out from the bag by using a screw driver. After the whole layer covering the bottom of the bag was taken out, they saw a transparent plastic packet containing the suspected drug syabu hidden at the bottom of the bag which PW9 took it out. PW11 also said that he saw the bottommost section of the bag was modified and he felt traces of glue.

[29] PW9 then explained to SM in the English language about the discovery and PW11 saw her frightened. When asked in cross-examination, PW11 said that before being detained, both the accused looked happy and were laughing and after being detained and while their bags were scanned, they appeared restless. Both cried after drugs were found in their bags.

[30] The last witness for the prosecution was PW12 who testified that on 19 February 2011 he was on duty as the investigating officer attached to the Barat Daya District Police Station and at about 9.10pm he was informed by PW9 on the arrest of the two accused persons LF and SM. On receiving the information PW12 and Constable 171827 Syaiful Azli bin Mohd Said (PW1) the police photographer, went to the Penang Bayan Lepas International Airport where he met PW9 and the two accused.

[31] PW9 showed PW12 the scene of the happening at the Domestic Arrival Hall and he asked PW1 to take photographs. PW9 later handed over to him the Search List, a document listing down all the exhibits given to him including P17 and P18 with the drugs still inside each trolley bag, and both accused namely LF

and SM. On receiving P17 and P18, PW12 also checked the contents including the plastic packets of drugs found inside each bag.

[32] PW12 then brought both the accused together with all the exhibits seized as seen in P29 to the District Police Station in Balik Pulau. At the police station PW12 directed another police photographer Cpl. Badrul Hisham to take photographs of all the exhibits as seen in P7 (1-33) and P6 (1-52). Photographs of clothes fitting on both LF and SM were also snapped. PW12 followed up by making two police reports and he also recorded statements from both LF and SM with the aid of an Iranian interpreter. PW12 did investigate the two women nationals of Iran and found out that both had come to Penang twice before this trip, when they were arrested.

[33] PW12 also packed the two transparent packets of drugs into two cardboard boxes and sealed them and marked as "MK" and "MK1" respectively and on 22 February 2011, he sent them to the chemist PW5 for analysis. On 1 June 2011, PW12 received back both boxes from the same chemist together with two Chemist Reports. After that he kept the exhibits received from PW5 and on 25 July 2011 he sent the two boxes to the police exhibits store for safekeeping. Throughout the period that he dealt with all the exhibits as an investigating officer, they were always under his custody and no one had access to them.

[34] After PW12 had finished giving his testimony, the prosecution closed its case. The learned Deputy Public Prosecutor offered D/Cpl Abdul Wahab, D/Cpl Catherene, L/Cpl Rafedah and the Iranian interpreter named Torasham Adhi for the defence.

[35] Both learned defence counsel did not need any of the witnesses.

Submissions

Defence Counsel For LF

Ingredients Of The Offence

[36] Learned defence counsel for Leila Fatemi submitted that at the close of the case for the prosecution, the court must make a maximum evaluation of the prosecution evidence in accordance

with s. 180(1) and (2) of the Criminal Procedure Code. He cited *Balachandran v. PP* [2005] 1 CLJ 85 (FC) and *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 (CA) to illustrate the principle.

[37] He further submitted that the prosecution must prove the ingredients of the offence namely custody and control of the drugs and exclusive possession. The accused must be shown to have *mens rea* or guilty knowledge of the drugs, meaning full knowledge. Mere knowledge was insufficient.

[38] He argued that the prosecution did not prove possession and thus no presumption provided by the Dangerous Drugs Act 1952 applies.

Drugs Concealed

[39] The defence pointed out that the drugs was hidden in P17 and could not be seen. LF's bag was scanned three times and after that P17 was forcibly opened to get hold of the plastic packets of drugs.

No Actual Transaction Of The Drug

[40] The witnesses for the prosecution confirmed that at the material time there was no actual trafficking in relation to the drugs concealed in LF's bag. The accused was not seen to have touched or done anything with the drugs or even tried to retrieve it from the bag. *Sridhar Arunasalam v. PP* [2009] 6 CLJ 595 (CA) was cited to support the defence's contention.

Knowledge

[41] It was contended that the prosecution failed to prove that the accused had knowledge of the drugs by 'any form of evidence.' PW9 said that the accused was behaving suspiciously before he approached her. PW9 was not forthcoming in his answers to questions put to him. However PW11 gave evidence that the two accused LF and SM were seen happy and laughing. Their contradiction is clear and anyway, such conduct of suspicious behaviour is not evidence of any guilt on the part of the accused.

[42] Thus the prosecution had not proved a *prima facie* case against the accused and her defence should not be called.

A **Defence Counsel For SM**

Ingredients Of Offence

[43] The prosecution failed to prove the elements of the trafficking offence which are custody, control and possession against the accused in connection with the drug (P15C) hidden inside her bag. The drug was concealed professionally and the prosecution failed to prove *mens rea* possession/knowledge of the drug in question upon the accused. *Toh Su Kuan v. PP* [2005] 3 CLJ 740 (CA) and *Chan Pean Leon v. PP* [1956] 1 LNS 17 were cited to support his argument.

Bag P18

[44] PW9 said that P18 was not locked and hence anyone could have opened the bag and this shows SM did not have control and knowledge of the hidden drug.

Burden Of Proof

[45] The court, after assessing the evidence for the prosecution on the basis of maximum evaluation which finds that a *prima facie* case has not been made out, should acquit the accused (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC)).

[46] The prosecution by failing to establish a *prima facie* case against the accused SM should result in her defence not being called by the court, and she ought to be set free.

Prosecution

Burden Of Proof

[47] The learned Deputy Public Prosecutor submitted that at the end of the prosecution case, s. 180(1) of the Criminal Procedure Code applies. She cited *Balachandran v. PP* [2005] 1 CLJ 85 (FC) which held that the standard of proof at the close of the case for the prosecution is to make out a *prima facie* case.

[48] She referred to *Mozley and Whiteley's Law Dictionary* 11th edn. which defines the meaning of a *prima facie* case and submitted that based on the facts and evidence given in court, the prosecution had proved a *prima facie* case against both the accused.

Elements Of The Offence

Possession

[49] The evidence of PW9 shows that on 19 February 2011 around 8.10pm while on duty in the Arrival Hall at the Bayan Lepas International Airport, he observed the two accused behaving suspiciously. After both the accused had taken their bags from the carousel, PW9 approached them and identified himself as a police officer in simple English language. He next examined their passports.

[50] PW9 established the fact that LF was carrying a hand bag and a chocolate coloured trolley bag (P17) while SM was carrying a hand bag together with a light coloured blue trolley bag (P18). After their bags were scanned, suspicious images were seen inside each bag and after inspecting the contents of the two bags, the drugs were found concealed at the bottom of each bag.

[51] She drew attention to the conduct of both accused as being restless and fearful (gelisah dan ketakutan) since the moment both were detained and taken to the scanning machine where the suspicious images surfaced and being escorted to the airport Narcotics Office for further checking of their bags. Upon the discovery of the drugs P12C hidden inside P17 and P15C hidden inside P18, both LF and SM started to cry.

[52] D/Cpl 122482 Zaimi bin Abidin (PW10) who was with PW9 that particular night together with other police personnel corroborated the evidence of PW9 in saying that both the accused were seen to be in a suspicious manner (berada dalam keadaan mencurigakan). He was asked by PW9 to help PW6 in holding P17 when PW6 was opening the bag. PW10 gave evidence to show that the moment both the accused were being detained by PW9 and taken to the scanning machine and subsequently to the Narcotics Office and before inspection of P17, they exhibited restless and fearful reaction. When the drugs were eventually discovered inside specially modified compartments of their bags, both began to cry.

[53] PW11 gave the same evidence on the reaction of both the accused in the circumstances mentioned by PW10.

[54] The prosecution contended that all this evidence shows that both accused were in possession of the drugs found hidden inside P17 and P18, thus having custody/control of them. PW9 and PW10 gave evidence that when both accused were first being detained and escorted to the scanning machine and finally to the airport's Narcotics Office, each of them was bringing her own bag containing the drugs.

[55] The prosecution thus had proved possession under s. 37(d) of the Dangerous Drugs Act 1952 against both accused.

[56] The cases of the cited *Chan Pean Leon* and *PP v. Denish Madhavan* [2009] 2 CLJ 209 (FC) were referred to by the learned Deputy Public Prosecutor on the meaning of possession.

Knowledge

[57] Based on the evidence of the prosecution witnesses that the reaction of both accused before the discovery of the drugs was being fearful and restless, and after the drugs (P12C and P15C) were found they straightaway cried, only reflected their knowledge of the presence of the concealed drugs. The court could make this inference on the issue of knowledge.

[58] The Federal Court case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 was cited by the prosecution to bolster up her contention.

Trafficking

[59] Section 2 of the same Act applies as "concealing" is relevant in both cases here. *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 was cited to lend weight to her argument.

Amount Of Drugs

[60] The amount of drugs discovered was substantial thus they were not meant for personal consumption as seen in *Ong Ah Chuan v. PP And Another Appeal* [1980] 1 LNS 181, the Privy Council case.

Chemist Evidence

[61] The chemist's evidence (PW5) is sufficient to show that the two transparent plastic packets and their substances after analysis is the methamphetamine and his evidence must be accepted at

face value on the authorities of *Munusamy v. PP, PP v. Lam San* and *Khoo Hi Chiang v. PP* as referred to by the cited case of *Balachandran v. PP*.

Chain Of Evidence In Regard To The Exhibits

[62] The evidence of PW1, PW2, L/Cpl 128910 Mohd Sofian bin Abd Aziz (PW3) the Store Keeper, PW5, PW9, PW12, all show that there was no break in the chain of evidence in regard to the exhibits. The Court of Appeal Case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551 and *Su Ah Ping v. PP* [1979] 1 LNS 100 were referred to by the prosecution to support the contention.

[63] There was no doubt about the identity of the drug exhibits seized, sent to the chemist and produced in court.

Clothes Fitting

[64] As warning had been administered to both the accused before being asked to wear the clothing for the photographs to being taken, thus ID30, ID31, ID36 and ID 37 should be admitted as exhibits.

[65] Summing up, the learned Deputy Public Prosecutor said that the prosecution had proved a *prima facie* case against both accused Leila Fatemi and Sahar Mohammadi, therefore their defence ought to be called.

The Court's Findings

Section 180 Of The Criminal Procedure Code

[66] The procedure after the conclusion of the prosecution case to be followed by the court ought to be in accordance with s. 180(1), (2), (3) and (4) of the Criminal Procedure Code.

[67] Section 180(4) states:

> For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[68] In other words, not only must the prosecution witnesses but also the documentary evidence tendered by the prosecution must be credible to prove each ingredient of the offence.

Case Law Authorities

[69] In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, the Court of Appeal held that:

> The correct test to be applied in determining whether a *prima facie* case had been made out under s. 180 of the Criminal Procedure Code was that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato Mokhtar Hashim & Anor v. PP* [1983] 1 CLJ 138; [1983] CLJ (Rep) 721. Therefore, a judge sitting alone under s. 180 of the CPC must subject the prosecution evidence to maximum evaluation and to ask himself the question 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case?' If the answer was in the negative, then no *prima facie* case had been made out and the accused would be entitled to an acquittal. Subjecting the evidence of the prosecution to maximum evaluation to determine if the defence was to be called did not mean that the prosecution had to prove its case beyond a reasonable doubt at this intermediate stage (see pp 80H-I, 81D-E, 85E); *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232 followed.

[70] In *Balachandran v. PP* [2005] 1 CLJ 85, the Federal Court held that the test at the end of the prosecution case is that "Is the evidence sufficient to convict the accused if he chooses to remain silent?" If an affirmative answer is there, then a *prima facie* case has been made out and in doing so, the trial court must necessitate a consideration of any reasonable doubt existing in the prosecution case. If there is any such doubt, no *prima facie* case.

[71] In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 the Federal Court laid down the principle that whether a *prima facie* case has been established at the close of the case for the prosecution, the trial court is required to carry out a maximum evaluation of the prosecution evidence in order to determine whether to call for the defence of the accused or not.

[72] The process involves an assessment of the credibility of the prosecution witnesses and the drawing of inferences admitted by the prosecution evidence. If the evidence for the prosecution admits two or more inferences, one of which is in the accused's favour, then the court's duty is to select the inference that is favourable to the accused.

[73] In *Lee Kwan Woh v. PP* [2009] 5 CLJ 631, the Federal Court held that:

> What was required of the learned trial judge at the close of the prosecution case was to undertake a maximum or positive evaluation of all the evidence tendered at that stage. In *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC), the test to be applied under s.180 at the close of the prosecution case was stated as follows:
>
> > This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses for the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v. PP* [1948] 1 LNS 122; *PP v. Kasmin bin Soeb* [1974] 1 LNS 116. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused elects to remain silent, the court must proceed to convict him.

[74] Issues

1) Whether the prosecution has proved "possession" under s. 37(d) of the Dangerous Drugs Act 1952 against both the accused persons?

2) In particular, whether both accused by giving the particular impression of being in a suspicious manner (berada dalam keadaan mencurigakan) from the outset when PW9 observed

A them in the International Arrival Hall at the airport after having disembarked from a flight from Singapore and being restless and fearful (gelisah dan ketakutan) throughout after been detained and taken to the scanning machine for scanning of their trolley bags (exh. P17 and P18) which displayed
B suspicious images and subsequently being escorted to the airport Narcotics Office for further inspection of P17 and P18 and their contents and eventually upon discovery of the hidden drugs inside specially modified compartments of their trolley bags, both accused burst into tears; can it be said to
C impute knowledge of the presence of the concealed drugs to both accused?

Credibility Of The Prosecution Witnesses

D **[75]** The court finds that all the prosecution witnesses especially the complainant of the case C/I Balber Singh a/l Hadep Singh (PW9) who has had worked for the past nine years with the Narcotics Branch based at the Bayan Lepas International Airport to be credible witnesses. The court also does not doubt the
E authenticity and veracity of the documentary evidence tendered by the prosecution. See *PP v. Mohamed Ali* [1962] 1 LNS 129, *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 (SC), and *Yusri Pialmi v. PP* [2010] 4 CLJ 828 (CA).

Ingredients Of The Offence

F

Custody or/and Control/Possession

[76] In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 (FC) per Arifin Zakaria FCJ (as His Lordship then was) viewed that it is
G settled law what constitutes "possession" under s. 37 of the Dangerous Drugs Act 1952 (Act 234) is a question of law. On the other hand, it is a question of fact whether in a given case, a person can be said to be in possession of something.

[77] In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53, Taylor J
H pointed out that there is no presumption of custody. The presumption is from custody. The learned judge defined the meaning of 'custody.'

I

> Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession. The main distinction between custody and possession is that a custodian has not the power of disposal.

[78] On "control" the learned judge viewed:

> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons... **the terms possession, custody, control and power of disposal must have the same meaning** whether the goods are innocent or contraband ...

[79] In *Chiah Tian v. Rex* [1937] 1 LNS 9, the accused was charged with possession of dutiable liquor contrary to the Liquors Revenue Ordinance s. 28. Revenue officers from their ambush position saw a rickshaw puller handing over a parcel to the daughter of the appellant aged about 14 or 15 years at the back door of the premises. They rushed forward into the courtyard and the girl ran into the house. The parcel was found to contain rubber inner tubes full of dutiable liquor.

[80] Mc Elwaine CJ quashed the conviction on appeal and opined that he was not satisfied that the girl or her father through her agency had such possession as to constitute an offence under s. 28. In his opinion possession to be an offence where he referred to Pollock, CB in *The Queen v. Woodrow*, 16, LJ MC 122; "a man can hardly be said to be in possession of anything without knowing it."

[81] His Lordship further explained:

> *I think that a man is not guilty of the offence of possession if he is not aware of the possession. There must be some evidence from which it can reasonably be inferred that the accused knew the general nature of the thing alleged to be in his possession,* such as evidence of length of time he had the object, evidence that he was expecting it, evidence of a course of business, or any other evidence from which an inference of knowledge of the general nature of the thing can be inferred. I use the words 'general nature of the thing' advisedly.

[82] Gordon Smith Ag CJ in *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72, where the Firearms and Ammunition (Unlawful Possession) Ordinance 1946, s. 3 was involved:

> Possession to incriminate a person must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be consciousness of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

[83] In *Tan Boon Teck v. PP* [1949] 1 LNS 89 where the charge was preferred under s. 39(1)(e) of the Trade and Customs Enactment, Johore, Laville J explained that the reference to 'knowingly' in s. 135(1)(d) is superfluous in relation to offences of possession. Per Laville J:

> In section 39(i), when the charge is one of possession, the word 'knowingly' is redundant. *One of the ingredients of possession is knowledge of the nature of the thing possessed by the alleged possessor and knowledge that it is within his powers and opportunity of disposal either exclusive to himself or jointly with others.*

[84] In *Chan Pean Leon v. PP* [1956] 1 LNS 17, Thomson J defined 'possession' by quoting from *Stephen's Digest* (9th edn, p. 304):

> A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which both must be present before possession is made out …
>
> … Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[85] In *Saad Ibrahim v. PP* [1967] 1 LNS 154 Yong J emphasised the requirement of establishing the element of knowledge on the part of the accused before he could be incriminated with possession:

> In my opinion, mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have power of disposal over it. Without these characteristics, possession raises no presumption of *mens rea*. Without *mens rea*, possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[86] The Court of Appeal case in *PP v. Hafiszamri Ahmad & Anor* [2007] 1 CLJ 285 echoes the same principles on possession. His Lordship Hasan Lah JCA (as he then was) referred to the cited *Toh Ah Loh & Mak Thim v. R* and *Saad Ibrahim v. PP* cases.

Possession

[87] By undertaking a maximum evaluation of the prosecution evidence adduced, the court finds that at the highest, the prosecution had only proved mere possession of the two trolley bags P17 and P18 without *mens rea* possession on the part of the two accused in relation to the concealed drugs inside them on the authority of the case of *Saad Ibrahim*. Both accused were seen to be carrying/pulling their trolley bags.

Knowledge

[88] Knowledge which is one of the important ingredients of the offence of possession was not proven by the prosecution. The prosecution relied heavily on the conduct of both accused as seen in their restless and fearful manner before the discovery of the hidden drugs and in tears upon the discovery of the drugs. In *PP v. Majid Saleh Jahromi bin Amrollah* [2012] 6 CLJ 236, the Court of Appeal held that it was insufficient to rely on evidence of witnesses that the respondent looked fearful and restless (ketakutan dan gelisah) in order to infer knowledge against the respondent, as that was a matter of perception.

[89] It further held that there was no positive conduct on the part of the respondent like attempting to escape or struggling when apprehended. Likewise in the present case, both accused did not try to make a bolt for it when confronted by PW9 and his team of police personnel nor did they attempt to prevent their bags from being searched when ordered by PW9.

A **Contradictions In Prosecution Own Evidence**

[90] On the contrary, PW1, the prosecution's own witness, repeatedly gave evidence during examination-in-chief that before both accused were detained by PW9, both LF and SM looked
B happy. When being cross-examined, PW11 said both accused had the appearance of being happy and were even laughing.

[91] In re-examination, PW11 again said that before both accused were being detained, to enable their bags to be scanned and searched, they were happy. In fact he did say happy and
C laughing when the learned Deputy Public Prosecutor realised the damage done, quickly chipped in so as not to let in 'laughing' as evidence. (The court CRT bears testimony to this part of the re-examination).

D **[92]** Now there are two pieces of evidence given by the prosecution witnesses themselves that contradicted with one another.

[93] Looking at another angle, appearing fearful and restless
E could have given rise to the inference that both accused might have knowledge of the concealed drugs. On the other hand as pointed out by the learned Court of Appeal judge Hasan Lah JCA in the cited *PP v. Majid Saleh Jahromi Amrollah* case, such reaction can also be a matter of perception. But what is more, as Spenser
F Wilkinson J opined in the Court of Appeal case in *Tai Chai Keh v. PP* [1948] 1 LNS 122:

> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should
G be adopted.

[94] In *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 Zulkefli Ahmad Makinudin FCJ (as he then was) now YAA the Chief Judge held:

H

> It is our finding that there is no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest. *There are so many favourable inferences that can be made from the existing factual matrix of this case* …

I

All these inferences which are favourable to both the accused were never considered by the High Court and the Court of Appeal. These inferences have the effect of casting reasonable doubt on the element of custody and control. The failure on part of the court below to consider this issue in our view is a misdirection in law.

[95] By being seen to be happy and laughing at the airport, the court can also infer that both accused LF and SM did not have any knowledge of the hidden drugs inside their trolley bags, otherwise generally considering normal human conduct they would not have reacted in that manner.

[96] In *Phoon Liat Sum v. PP* [1950] MLJ 205, Hill J was of the opinion that in a case where some of the evidence on which the inferences were drawn by the trial judge was capable of a construction equally in favour of an appellant, the benefit of the doubt should have been given to him.

[97] Again PW9 in examination-in-chief gave evidence that both the trolley bags P17 and P18 containing the drugs were not padlocked. He said "Saya ada buat pemeriksaan, bag itu (P17) tidak berkunci, sama juga pada bag P18".

[98] PW10 also said that when PW9, himself and other police personnel first approached the two accused and after PW9 had identified himself as a police officer to them, he saw both bags closed in good condition, without mentioning that P17 and P18 were padlocked.

[99] PW6 who was directed by PW9 to open P17 also did not say anything about the bag being padlocked. He was asked by the prosecution, "Ada apa-apa sifat yang istimewa pada beg yang awak boleh ingat?" PW6 answered "Itu saja".

[100] PW7 who opened P17 also did not say that it was padlocked.

[101] In fact no padlocks were ever produced in court as evidence.

[102] Whereas PW11 during examination-in-chief testified "Di pejabat (airport Narcotics Office) saya telah diarahkan oleh SP9 untuk membuka beg (P18) bersama Kpl Wahab. Sebelum dibuka, beg itu tertutup dan beg dikunci".

[103] Applying the principles in *Tai Chai Keh* and *Phoon Liat Sum* cases, the court draws the inference favourable to both accused in that, if the two trolley bags were padlocked, and by having the padlock keys in their possession, it might give rise to the inference that both accused could have probably known of the hidden drugs in their bags as the rest of their clothing and other personal belongings (without being degrading to both accused) are not expensive items that needed to be padlocked.

[104] Again the very fact that both P17 and P18 were not padlocked, gives the inference that both accused did not know at all about the presence of the concealed drugs inside the specially modified compartments inside each bag because as alluded to earlier (again without being derogatory to both accused) their clothing unlike designer clothes and other personal items did not need to be padlocked. See *Liew Chee Hong v. PP* [2007] 6 CLJ 702 (CA).

[105] Ultimately both Federal Court cases in *Balachandran v. PP* and *PP v. Mohd Radzi Abu Bakar* that were referred to earlier endorsed the principle laid down in the cited *Tai Chai Keh*'s case.

[106] In the former case, recapitulating, "The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the evidence is in the affirmative then a *prima facie* case has been made out. This must of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

[107] Here guided by the principle as stated in the *Balachandran* case, in the same scenario, this court finds reasonable doubt in the prosecution case, thus, it finds that the prosecution had not established a *prima facie* case against both the accused persons.

[108] In the cited Court of Appeal case in *PP v. Hafiszamri Ahmad & Anor* [2007] 1 CLJ 285 His Lordship Hasan Lah JCA (as he then was) referred to the judgement of Taylor J in *Leow Nghee Lim v. Reg*ina as cited earlier where Taylor J viewed:

> In my view, this argument takes insufficient account of the particular facts proved. **An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence ...**

[109] What is of significance apart from this is that both trolley bags which were not padlocked, also results in the court inferring the possibility of access by other persons to them which could probably have resulted in the drugs being put into the specially modified compartments of P17 and P18 without the knowledge of both accused.

DNA Report

[110] SP8 who conducted the DNA (deoxyribonucleic acid) profiling (P25) does not show that the two accused had *mens rea* possession of the hidden drugs.

[111] At the highest, it only shows that the accused SM had contact with the personal belongings inside the bag. No cogent evidence including blood specimen of LF was forthcoming to show that both accused had packed their personal belongings into their bags for example by eliciting evidence from their police statements to that effect.

Prosecution Contention - Knowledge

[112] The prosecution cited the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 (FC) where the Federal Court held that the appellant in looking shocked or stunned when approached by the police was admissible under s. 8 of the DDA as conduct having a direct bearing on the fact in issue.

[113] The facts in that case can be distinguished from this instant case as the drugs there were found tucked away in the waistline in the jeans worn by the accused which the appellant ought to have known of it. However, in the present case, the drugs were cunningly concealed in the specially modified compartment of each bag. There was no body contact.

[114] In addition to this contradictory evidence, PW9 testified during examination-in-chief, that when their trolley bags were being scanned, both LF and SM asked all sorts of questions (mereka bertanya macam-macam).

[115] The court is of the opinion that the man (or woman) in the street who is innocent and has nothing to hide when put in the shoes of both the accused would have acted like LF and SM. With regard to ordinary human conduct, an innocent person when

being confronted with the prospect of having committed an offence would usually ask many questions to get to the bottom of the matter as his reputation and liberty are at stake.

[116] PW7 in examination-in-chief gave evidence that after scanning P17 belonging to LF and finding suspicious images inside the bag, he then acted to open P17 in order to inspect the things inside it. PW7 said "Ketika itu, penumpang (LF) pun membenarkan saya membuka beg." The accused PW17 of her own accord allowed PW7 to open her bag to check its contents.

[117] The very spontaneous action of LF in allowing PW7 to open and search the contents of her bag without any hesitation only strengthens the court's inference that she had no knowledge of the hidden drugs in the specially modified compartment of the bag not visible to the naked eye.

Baggage Tag

[118] It is also noteworthy to say that the luggage tag in the name of Leila Fatemi (Exhibit photograph P7[6]) was found affixed to the handle of P18, the light coloured blue trolley bag belonging to the accused SM. There was no explanation from the prosecution witnesses especially the investigating offer officer PW12, on how the tag could be there.

[119] The court did not admit the photographs of the clothes fitting on both accused (ID30 and ID31) as there was no convincing evidence that both accused had consented to having their photographs taken with the relevant clothes being tried on them. Moreover PW12 could not answer satisfactorily on whether a warning purportedly administered before the photographic sessions was clearly understood by both accused.

[120] Consequently, the implication of the existence of the luggage tag with the name 'Leila Fatemi' attached to the handle of the trolley bag (P18) of SM without any explanation from any of the prosecution witnesses results in the court to infer that the accused SM could probably just have been carrying/pulling P18 for the accused LF. In other words, P18 might not have even belonged to the accused SM and she was not found to have mere possession of any luggage, let alone the concealed drugs inside it. That is putting aside for the time being the logic and common

sense that in general, any international flight passenger will at least bring along a piece of luggage to store clothing and other personal belongings, however, not necessarily so.

[121] Therefore, the court concludes that the prosecution had not incriminated both accused with *mens rea* possession of the concealed drugs and establishing one of the important ingredients of the offence that is knowledge. It did not show that both accused had control over the hidden drugs.

[122] The presumption under s. 37(d) of the Dangerous Drugs Act 1952 as contended by the prosecution does not apply to the facts shown in the case against both accused on the separate charges against each of them. The same can be said for the evidence adduced.

[123] The element of trafficking under s. 2 of the same Act as argued by the prosecution also does not apply here based on the facts of the case. Both accused were only found to have mere possession of their trolley bags without *mens rea* knowledge of the incriminating drugs hidden.

[124] Incidentally, the learned Deputy Public Prosecutor drew the court's attention that prior to this trip where they were arrested at the airport and charged with the offences, both accused LF and SM had been to Penang twice. With due respect to her, this is not a case involving similar fact evidence and what she said was a mere bare statement without any probative value.

No *Prima Facie* Case

[125] All in all, subjecting the prosecution evidence to a maximum evaluation as well as assessing the credibility of the prosecution witnesses especially D/L/Cpl Mansor bin Yaacob (PW11) and the reliability of the documentary evidence adduced by the prosecution, the court finds that the prosecution had failed to make out a *prima facie* case against both the accused Leila Fatemi and Sahar Mohammadi in relation to each of the separate charges levelled against them individually. In consequence of the findings, the court did not direct them to enter their defence and acquitted and discharged both the accused.